

Legal 8

23 November 1976

MEMORANDUM FOR: Chief, General Law Division

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FROM

:
Office of General Counsel

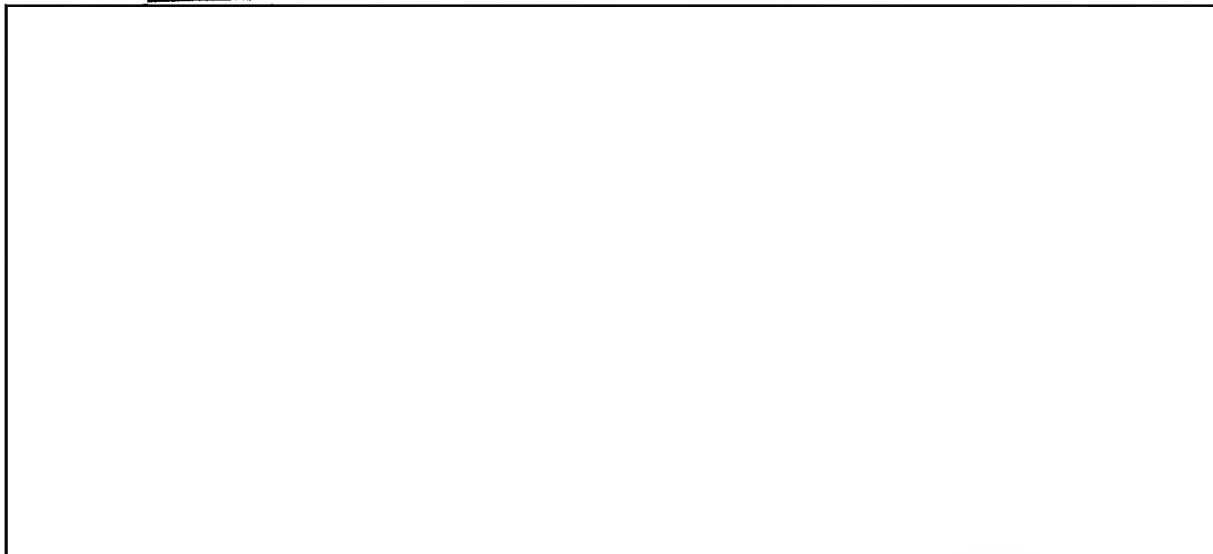
SUBJECT

: Review of DCID 1/7, As Revised 18 May 1976,
As to Legality, Accuracy, Desirability and
Clarity

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1. Legality.



b. National Security Council Intelligence Directive (NSCID) Number 1 generally empowers the DCI, in Section 3(c), to issue DCIDs as necessary to implement NSCIDs, and specifically, in Section 3(g)(2), to issue a DCID establishing policies and procedures for continuous interchange of intelligence information within the Intelligence Community. Further, Section 7 requires the DCI to develop procedures to protect intelligence sources and methods from unauthorized disclosure.

c. Executive Order 11652 prescribes classification, safeguarding and monitoring procedures and provides, in Section 6, that directives will be issued through the National Security Council (NSCIDs) to protect classified information from loss or

compromise and insure its use only under conditions preventative of unauthorized dissemination. Further, Section 9 recognizes that, in addition to the authorized classification levels, "special requirements" regarding access, distribution and protection of classified information may be imposed by appropriate authorities. Implementation of this Executive Order has been accomplished through an NSCD of 17 May 1972 which establishes certain warning notices, identifies certain operating procedures (i.e., "need to know," "third agency rule"), and recognizes the establishment of "special rules limiting access and distribution of classified information."

d. The sum total of this amalgam of authorities is that the DCI has the power, if not the affirmative obligation, to issue a DCID which imposes special requirements or limitations upon access to and dissemination of classified information.

2. Accuracy.

a. As you know the citation in footnote 4 to Section 123 of the Atomic Energy Act of 1954, as amended, is incorrect and should be to Section 142 of the Act. This inaccuracy has been carried forward from the same footnote in DCID 1/7 of 5 October 1975. A further inaccuracy in this footnote, also carried over from the prior DCID, is the reference to "formerly RESTRICTED DATA," properly identified as "FORMERLY RESTRICTED DATA."

b. Section 3b of the DCID is a rather ambitious representation of the "need to know" principle as enunciated in the NSC Directive of 17 May 1972. Section VI(2) merely states that "a person must have a need for access to the particular classified information or material sought in connection with the performance of his official duties or contractual obligations."

c. The source of the definition of "authorized channels" in footnote 3 is not stated. Since that term is not used elsewhere in the DCID, its definition here (once-removed since it is cited as used in the NSC Directive) seems superfluous. In any event, the inclusion of contractors and consultants in "authorized channels" is questionable in light of the control marking explained in Section 5a(3) of the DCID and the special procedures for release to such persons contained in the Attachment to the DCID. Further, the Attachment is misleading insofar as it implies in Section 2, that only materials marked as NOT RELEASABLE TO CONTRACTORS or PROPRIETARY INFORMATION INVOLVED may not be released to contractors when the presence of other control markings or warning notices also may prohibit such dissemination.

3. Desirability. The desirability of a clear and accurate statement of a uniform policy for access to intelligence information which at the same time avoids improper dissemination is obvious in light of the restrictions which the "third agency rule" imposes upon the interchange of such information.

4. Clarity. After long, and perhaps undue, agonizing over its meaning, I have to conclude that DCID 1/7 is not a clear statement of such policy.

a. The basic rule of dissemination involved is the "third agency rule" which bars a recipient from releasing classified information without the originator's permission. Seeking practical means of accommodating this principle while serving the needs of the Intelligence Community, DCID 1/7 sets forth a general advance authorization for releasing such information to other agencies and foreign Governments. Having done this, DCID 1/7 then allows the originator to place restrictions on this advance authorization by the use of certain control markings. The clarity and consequent utility of DCID 1/7 as a vehicle to accomplish this purpose is questionable. For example, ignoring the hesitation caused by repetitive and excess verbiage:

(1) There appears to be, chiefly in Sections 4b and c, an attempt to treat use of documents as a whole from use of portions or paraphrases drawn from such documents. If such a distinction is intended, it should be stated clearly and in more logically organized fashion.

(2) Section 4b states that such paraphrasing may be done to the extent not limited by control markings. The next sentence states that the WARNING NOTICE of the NSC Directive shall not, "for the purposes of this authorization," be considered a "restrictive" (i.e., control (?)) marking. This could be read to mean that such paraphrasing may be accomplished with impunity despite the presence of the WARNING NOTICE, an interpretation which is inconsistent with the restriction intended by such a notice - no dissemination in any manner without originator consideration and consent. On the other hand, this could be read to refer back to and delimit the general "authorization" stated in Section 4a. Of course, since the warning notice is distinguished from "restrictive" rather than "control" markings, it is not unreasonable to conclude the sentence is irrelevant.

Compounding the confusion is the clear reference in Section 6b to the warning notice as a "control" marking.

(3) Section 4c is unclear in that it allows extraction and incorporation of information lacking control markings into "reports" to foreign Governments, whereas 4b allows such use in only "classified reports" to other agencies. This may be an intended omission, but is more likely an oversight.

(4) Section 5a states that control markings must be "individually assigned," implying that they cannot be used in combination - a conclusion contradicted by Sections 5a(2) and (4). Section 5a(4), by stating that CAUTION-PROPRIETARY INFORMATION INVOLVED may be used in conjunction with the bar on release to contractors, implies that the other control markings may not be so used - a conclusion belied by Section 5a(2).

(5) The use of footnote 5 in Section 4c implies that the restricted data notices are not control markings - a conclusion which if correct does not seem accurate.

(6) It is unclear whether THIS INFORMATION HAS BEEN AUTHORIZED FOR RELEASE TO ... in Section 5a(5) may be used only together with the NOFORN marking, or whether it may be used independently, and, if so, whether such a marking necessarily bars release to other countries than the one cited.

(7) Section 6a bars use of information contrary to the restrictions of the control markings without consent of the originator. Does this mean only that use specifically "marked" against must be agreed to by the originator, or also that any of the uses which control markings might be used to bar must be agreed to by the originator despite the presence of merely a single marking? And what is the difference, except in phrasing between the first sentence and the last sentence of Section 6a? Restatement implies there is one.

(8) Finally, if I am confused and in error in regard to the existence of these questions, then am I not correct as to the utility and clarity of DCID 1/7?



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